

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

MARGIE J. PHELPS, ELIZABETH M.)	No. 13-cv-00011
PHELPS, AND TIMOTHY B. PHELPS,)	
ON BEHALF OF THEMSELVES AND)	
"INDIVIDUAL PICKETERS FROM THE)	
WESTBORO BAPTIST CHURCH,")	
)	
Petitioners,)	
)	
vs.)	RESPONSE TO PETITIONERS'
)	REQUEST FOR FEES AND EXPENSES
RED OAK POLICE CHIEF DRUE)	BY RED OAK POLICE CHIEF DRUE
POWERS, MONTGOMERY COUNTY)	POWERS AND MONTGOMERY
SHERIFF JOE SAMPSON, IN THEIR)	COUNTY SHERIFF JOE SAMPSON
PERSONAL CAPACITIES, IN THEIR)	
CAPACITY AS OFFICIALS,)	
)	
Respondents.)	
)	
And)	
)	
STATE OF IOWA,)	
)	
Intervenor.)	

COME NOW, the Respondents, Red Oak Police Chief, Drue Powers, and Montgomery County Sheriff, Joe Sampson, in their individual and official capacities, and Respond to Petitioners' Request for Attorney's Fees and Expenses.

The Respondent law enforcement officers generally agree with the Intervenor's Response to Petitioners' Request for Attorney fees. (Intervenor Response, Docket No. 13). This Court has discretion to award Petitioners with reasonable attorney fees under Section 1988, but the allocation of those fees should be in accordance with the purposes of Section 1988.

The purpose of Section 1988 is to promote private enforcement of civil rights by the citizens “while imposing the costs of rights violations *on the violators*.” *See Casey v. City of Cabool, Mo.*, 12 F.3d 799, 805 (8th Cir.1993) (citations omitted) (emphasis added). “In order for such a policy to be effective, Congress felt it appropriate to shift the true full cost of enforcement to the *guilty parties* to eliminate any obstacle to enforcement.” *Id.* (citations omitted) (emphasis added).

This case is about the State of Iowa’s renewed attempt to criminalize the misuse and desecration of the United States Flag. *See Iowa Code Ann. §§ 718A.1A, 723.6(6)*, and *Roe v. Milligan*, 479 F. Supp. 2d 995, 1010 (S.D. Iowa 2007). Petitioners direct their summary judgment motion toward “half measures” taken by the State in an “apparent attempt” to remedy the vagueness of those statutes. (Petitioner Brief, pp. 2, 4, Docket No. 84-3). Importantly, there have been no allegations that Respondent law enforcement officers acted unconstitutionally or were otherwise culpable. (Second Amended Complaint, Docket No. 30; Petitioners’ Statement of Material Facts, Docket No. 84-1). Petitioners simply attack the constitutionality of certain Iowa flag desecration statutes. (Petitioners Brief in Support of Summary Judgment, Docket No. 84-3).

On this point, the Court held that Iowa’s flag desecration statutes are, indeed, unconstitutionally vague and overbroad. *Phelps v. Powers*, ___ F.Supp.3d ___, 2014 WL 6865736, *8, *12 (S.D. Iowa December 3, 2014). Although Petitioners also succeeded on an as-applied challenge to the statutes, there were no allegations of culpable conduct on the part of Respondent law enforcement officers. These officers were simply performing their State imposed duty to enforce the flag desecration statutes. *See, e.g.*, Iowa Code Ann. § 723.4(6).

If the Court awards Petitioners with attorney fees, Respondents respectfully suggest the fees be allocated to the State as the only culpable Defendant – the party that re-crafted the flag misuse and desecration statutes to be unconstitutional. *See Casey*, 12 F.3d at 805.

WHEREFORE, Respondents, Red Oak Police Chief, Drue Powers, and Montgomery County Sheriff, Joe Sampson, in their individual and official capacities, respectfully pray the Court overrule Petitioners' Request for Attorney Fees to the extent it seeks fees for efforts that were unnecessary for the result and allocate those fees, if any, to the State. Respondents also request further relief as this Court deems just and proper.



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ATTORNEYS FOR RESPONDENTS RED OAK
POLICE CHIEF DRUE POWERS AND
MONTGOMERY COUNTY SHERIFF JOE
SAMPSON

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 5, 2015, the above and foregoing, RESPONSE TO PETITIONERS' REQUEST FOR ATTORNEY'S FEES AND EXPENSES, was electronically filed with the Clerk of the Court using the ECF system, service being made by ECF upon the following:

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